STATE OF MICHIGAN
SUPREME COURT

L.

JOANN KUSMIERZ, KERRY KUSMIERZ, KIM LINDEBAUM, ~~AND~~ JAMES B. LINDEBAUM, and M Supply Co Appellants
PLAINTIFFS-~~PETITIONERS~~,

Supreme Court #

Court of Appeals No: 258021 Opn 11/15/05

Bay Circuit Court File No: 01-3467-CZ-C
W. Caprathe

VS.

JOYCE SCHMITT AND DIANE RANKIN,

DEFENDANTS-
~~RESPONDENTS.~~ Appellees

AND

RONALD SCHMITT,

DEFENDANT.

130187
APL
1/17
28799

SKINNER PROFESSIONAL LAW CORPORATION
DAVID R. SKINNER (P20551)
STACI M. RICHARDS (P64566)
ATTORNEYS FOR PLAINTIFFS/PETITIONERS
101 FIRST STREET-SUITE 105
POST OFFICE BOX 98
BAY CITY, MICHIGAN 48707-0098
(989) 893-5547

Ok

PLAINTIFFS-PETITIONERS APPLICATION FOR LEAVE TO APPEAL FOLLOWING DECISION OF THE COURT OF APPEALS

NOTICE OF HEARING

NOTICE OF FILING OF APPLICATION FOR LEAVE TO APPEAL FOLLOWING DECISION OF THE COURT OF APPEALS

PROOF OF MAILING

ORAL ARGUMENT REQUESTED

Table of Contents

Index of Authorities

Cases

Statutes

Rules

Judgment Being Appealed and Relief Sought

Plaintiffs JoAnn Kusmierz, Kerry Kusmierz, Kim Lindebaum and James Lindebaum seek leave to appeal from the November 15, 2005 published opinion of the Court of Appeals (Court of Appeals Docket No. 258021) That opinion reversed and remanded the trial court's decision to award case evaluation sanctions to the Plaintiffs in a post-judgment order following trial. (Exhibit A)

Plaintiffs seek reversal of the Court of Appeals' interpretation of the case evaluation rules and an order affirming the decision of the trial court. Specifically, Plaintiffs seek a finding from this court that:

1. The Michigan Court Rules Regarding Case Evaluation Sanctions **do not require** the court to compare the case evaluator award and the jury verdict **using percentages** between **each pair of plaintiffs and defendants under MCR 2.403(O)(4)(a).**
2. The Michigan Court Rules do permit a trial court to consider equitable relief under MCR 2.403(O)(5) even where the case evaluators do not take equitable relief into consideration.
3. Reasonable Attorney fees under MCR 2.403(O)(6) are awardable to the prevailing party even when attorney fees have previously been awarded pursuant to an unrelated statute.

Additionally, Plaintiffs seek reversal of the Court of Appeals determination that Defendants did not waive their right to appeal when they paid Plaintiffs the judgment and case evaluation sanctions in full and requested Plaintiff to sign a Satisfaction of Judgment.

Statement of Questions Presented

I. **DOES MCR 2.403(O)(4) REQUIRE THE TRIAL COURT TO DETERMINE THE PREVAILING PARTY BY COMPARING THE CASE EVALUATION AWARD TO THE JURY VERDICT BEWTEEN EACH PAIR OF PLAINTIFFS AND DEFENDANTS USING THE FOLLOWING FORMULATION?**

EACH PLAINTIFF'S PROPORTION/PERCENTAGE OF THE TOTAL JUDGMENT IS MULTIPLED BY THE ADJUSTED TOTAL JUDGMENT AND COMPARED TO PLAINTIFF'S PORTION OF THE CASE EVALUATION AWARD WHICH IS DETERMINED BY DIVIDING THE TOTAL AMOUNT AWARDED AGAINST A DEFENDANT DIVIDED BY THE NUMBER OF PLAINTIFFS?

Petitioner says: "NO"

Respondent says: "NO"

Court of Appeals says: "YES"

Trial Court says: "NO"

II. **WAS IT WAS FAIR UNDER ALL OF THE CIRCUMSTANCES TO AWARD CASE EVALUATION SANCTIONS AGAINST THE DEFENDANTS AFTER TAKING INTO CONSIDERATION INJUNCTIVE RELIEF PURSUANT TO MCR 2.403(O)(5) BECAUSE (1) THE COURT RULE DOES NOT MANDATE THAT THE CASE EVALUATORS CONSIDER EQUITABLE RELEIF AND (2) BECAUSE ATTORNEY FEES ARE AWARDABLE UNDER MORE THAN ONE STATUTE AND COURT RULE AS LONG AS THE AGGREGATE AWARD DOES NOT EXCEED THE ACTUAL ATTORNEY FEES INCURRED?**

Petitioner says: "YES"

Court of Appeals says: "NO"

Trial Court says: "YES"

III. **DID DEFENDANTS WAIVED THEIR RIGHT TO APPEAL BY SATISFYING THE JUDGMENT AND ORDER FOR CASE EVALUATION SANCTIONS IN FULL?**

Petitioner says: "YES"

Respondent says: "NO"

Court of Appeals says: "NO"

Statement of Material Proceedings and Facts

This Application for Leave to Appeal is based solely on post-judgment matters which includes the interpretation of the case evaluation rule MCR 2.403 and whether or not Defendants waived their right to appeal by satisfying the judgment specifically as it pertained to the case evaluation sanctions awarded post-trial by the trial court.

Subsequent to the trial in this matter, the trial court awarded case evaluation sanctions in the amount of $67,259.60 pursuant to MCR 2.403. The Court compared the lump sum case evaluation award to the lump sum verdict and also took into consideration equitable relief in the form of an injunction entered against the Defendants post-trial.

Plaintiffs collected the full judgment and case evaluation sanction award. Defendants requested that a satisfaction of judgment form be executed by the Plaintiffs. Subsequently, Defendants filed an appeal challenging the award of case evaluation sanctions by the trial court. Plaintiff requested that the decision of the trial court be affirmed.

1. Court of Appeals

The crux of this application centers on the implementation by the Court of Appeals of a new methodology for apportionment of lump-sum case evaluation awards which is inconsistent with the language of the court rules, unsupported by prior authority, voids the stipulation of the parties that the plaintiffs are treated as a single party, and fundamentally unfair to the parties who were operating under the language of the court rules. Further, the Court of Appeals orders that Diane Rankin

be awarded case evaluation sanctions when there was not request for sanctions at either the trial court level or on appeal.

On its own motion, the Court of Appeals determined that Plaintiffs could not elect to be treated as a single party under MCR 2.403(H)(4) despite the parties' stipulation. The Court of Appeals then determined that the lump-sum case evaluation award must be equally divided between all the Plaintiffs without taking into consideration the harm to individual parties to the case. The Court of Appeals formulation is in excess of two pages and Plaintiff urges that this Court review the method used by the Court of Appeals. This is attached as Exhibit A.

In this case, it was obvious to the trial court, the jury, and the case evaluators that the Lindebaums were harmed by the Defendants' conduct substantially more than the Kusmierzs. This was never disputed. These parties were not equal when it came to damages.

The Court of Appeals reached this new methodology by erroneously concluding that the trial court erred in taking into consideration its award of injunctive relief pursuant to MCR 2.403(O)(5) because it was not fair under all of the circumstances reasoning that (1) the case evaluators had not considered equitable relief, and (2) the jury had already made awarded a portion of the attorney fees under MCLA 600.2911(7). Further the Court of Appeals disregarded the decision of the Plaintiffs to be treated as a single party – there was no objection to this arrangement by the evaluators or the Defendants.

Plaintiffs request reversal of this decision for a number of reasons: (1) the court rules **do not mandate** under MCR 2.403(K) that the evaluators consider

equitable relief in order for the court to take into consideration equitable relief under MCR 2.403(O)(5), (2) attorney fees can be awarded pursuant to more than one statute and/or court rule as long as the total award does not exceed 100% actual attorney fees, (3) there is no authority for disregarding the Plaintiffs stipulation to be treated as one unit or for the interpretation of MCR 2.403(O)(4)(a) that the apportionment of a lump-sum case evaluation be equally divided between all Plaintiffs, (4) MCR 2.403(H)(4) allows a family to be treated as one unit, and (5) the decision by the Court of Appeals renders MCR 2.403(H)(4) void. Under the circumstances in this case, the Court of Appeals ordered equal apportionment without the parties having the opportunity to accept or reject between each pair of parties.

The Court of Appeals essentially chose to disregard the fact finding of the trial court in favor of its own reasoning without finding that the trial court abused its discretion. The Court of Appeals admits in its opinion that **the trial court did not err in using MCR 2.403(O)(5) for this case.**

2. Basis for Action

Some factual background is necessary in order to understand the trial court's award of case evaluation sanctions.

Defendants accused the Lindebaums of being "embezzlers," "swindlers," "sexually frigid," "greedy," "selfish," "materialistic," "thieves," "a disgrace," "hypocrites," "a little bitch," "you've got a bad name," "mentally ill," lazy, unchaste, lacking in "morals, values and ethics," "calculating, " "Satan's Devils," "Mr. and Mrs.

Embezzler," "Little Miss Saigon," "assholes," committing "Trust Fraud," "Slime-Ball Brother," "Saigon Bitch," physically abusing the aged mother, Elizabeth, "a loser," "stabbing people in the back," "pathological liar," "wimp," "Black Ballers," "guilty as sin," and other outrageous statements and untruths. (PX 1-7, 10, 21-23, 31-32)

Defendants accused the Kusmierzs of being "co-embezzlers," "swindlers," "back-stabbers," "ass kissers," "hotsy-totsy wanna-be JoAnn," of fraudulently obtaining benefits for their children by misrepresenting their financial ability, "hypocrites," making "victims" of Kerry's mother, Dad, Ma and Kerry's grandmother..." and making other outrageous statements and untruths. (PX 1-7, 10, 21-23, 31-32)

On November 7, 2000, attorney for Plaintiffs sent a letter to Defendant Joyce Schmitt and those acting in concert with Joyce, requesting that they cease from making such defamatory remarks and that they retract statements and publications regarding James, Kim, and/or the M Supply Company.[1] (PX 13) The harassment, defamation, invasion of privacy, and stalking continued. A letter from Defendant Diane Rankin was sent to "Mr. and Mrs. Embezzler," the envelope addressed to Mr. and Mrs. Jim Lindebaum, stating: "Make NO MISTAKE Jim and 'Little Miss Saigon' WE ARE WATCHING YOUR EVERY MOVE!!!!" (PX 2) It further states: "YES, I DID TALK TO ARBERTA---I TOLD HER THE TRUTH ABOUT EACH ONE OF YOU!!!"

In a subsequent letter from Diane to "Slime-Ball Brother and Saigon Princess" (the Lindenbaums), she states in the middle of her outrage:

---

[1] M Supply Company is owned by James Lindebaum and was originally a party to the lawsuit.

BY THE WAY JIM, HAVE YOU HEARD HOW UPSET ALL OF MA AND DAD'S NEIGHBOR'S ARE WITH YOU FOR WHO THE PROPERTY WAS SOLD TO??? YOUR BAD REPUTATION IS GROWING!!!!! IF YOU THINK FOR ONE MINUTE, ME OR THE OTHER FAMILIES INVOLVED ARE GOING TO SHUT OUR MOUTH, YOU HAVE ANOTHER GUESS COMING....FOR AS LONG AS WE LIVE, WE WILL MAKE SURE PEOPLE KNOW WHO YOU ARE, WHAT YOU ARE, ... (PX 4)

Threats of government intervention and jail time were included as well as allegations that Jim hurried the death of his parents along. (PX 2) Joyce stated in her phone messages that she contacted the authorities. (PX 30 and 31) Subsequently, Kim and Jim were audited. (Vol IV, Pg 188)

The same types of letters were sent to the Kusmierzs. An anonymous person, referencing herself as "Jean," sent a letter to the Kusmierzs and numerous other individuals discussing how the Kusmierzs were defrauding the system and taking money that should go to disadvantaged children. (PX 15) Diane sent another letter to the Kusmierzs describing them as "Co-Embezzlers" and "Back Stabbers." Diane states in one of her letters that she received the letter from "Jean" and telling JoAnn how she is lower than her and how she is just "Miss Hotsy Totsy." Diane tells her that "Paybacks Are Hell." (PX 3)

Plaintiffs received other letters from individuals they do not know. Plaintiffs received subscriptions to magazines, such as Playboy, which they had not ordered. (PX 23) Defendants drove by Plaintiffs James and Kim Lindebaum's residence to spy on them whenever they felt like it as a further form of harassment. (Vol VI, Pg 132-133; Vol I, Pg 188; Vol II, Pg 48-49; Vol VI, Pg 186)

The Lindebaums were forced to obtain additional security devices for their premises. (Vol II, Pg 113-114; Vol IV, Pg 185) The only mechanism for ceasing this type of behavior was a lawsuit. The complaint included counts of Defamation, Intentional Infliction of Emotional Distress, Invasion of Privacy, and Intentional Interference with Advantageous Business Relationship.[2] Only after three years of litigation and thousands of dollars in costs to the Plaintiffs did the behaviors set forth above cease. Only at the time of trial was there any expression of remorse on the part of the Defendants. (Vol II, Pg 34-35; Vol III, Pg 150)

The trial court and the jury determined that Defendants Diane and Joyce are liable to the Plaintiffs for their tortuous conduct.

The trial court determined that in addition to a monetary judgment, **equitable remedy in the form of an injunction was warranted.** Based on the money judgment and the injunction, **the Court held that case evaluation sanctions were awardable to the Plaintiffs in the amount of $67,259.60.** (Exhibit B)

Defendants satisfied the judgment on September 7, 2004 and subsequently filed an appeal to have the order for sanctions reversed. (Exhibit C) Plaintiffs maintain that Defendants waived the right to appeal the order when they opted to satisfy the judgment rather than obtain a bond. The Court of Appeals held the judgment was satisfied pursuant to a garnishment, an involuntary procedure, and therefore, the appeal right was not waived. Plaintiffs maintain that this is contrary to legal precedent and that the proper procedure for the Defendants was to obtain a bond and stay

---

[2] The count for Tortuous Interference with Advantageous Business Relationship was

while filing their appeal. Plaintiffs further maintain that it was the Defendants that requested that a satisfaction of judgment be entered further waiving the right to appeal.

Plaintiffs request that the decision of the trial court be affirmed and/or this Court determine that Defendants' objection regarding the $67,259.60 awarded as case evaluation sanctions is waived.

3. Satisfaction of Judgment

On September 13, 2004, Plaintiffs' attorney signed a satisfaction of judgment pursuant to the request of attorney Holmes after receiving the full amount of the judgment and case evaluation sanctions ordered by the trial court. (Exhibit V and C)

On or about September 20, 2004, Plaintiffs received notice of Defendants Diane Rankin and Joyce Schmitt's Claim of Appeal. There were no motions filed to stay the execution of the orders and no requests to post an appeal bond.

Based on Defendants actions, it is apparent that their intent was to satisfy the judgment and pay the case evaluation sanctions.

Below is a timetable of the events.

June 4, 2001	Plaintiffs Filed Complaint
April 1, 2003	Jury Trial Started
April 17, 2003	Jury Verdict
February 10, 2004	Judgment Entered by the Trial Court
February 25, 2004	Plaintiffs Filed Motion for Case Evaluation Sanctions

---

dismissed prior to trial.

March 18, 2004	Ronald Schmitt Paid Judgment in Full
April 14, 2004	Joyce Schmitt Paid Judgment in Full
July 26, 2004	Garnishment Issued to Primerica
August 11, 2004	Order to Hold Funds in Escrow and Release Remaining Funds
August 25, 2004	Letter Received from Primerica
August 27, 2004	Received Check from Primerica for $92,063.52
August 31, 2004	Order for Case Evaluation Sanctions Entered
September 7, 2004	Returned $11,517.78 from Escrow to Diane Rankin
September 7, 2004	Diane Rankin Paid Case Evaluation Sanctions and Judgment in Full
September 8, 2004	Letter Received from Attorney Holmes
September 13, 2004	Satisfaction of Judgment Signed and Entered
September 20, 2004	Claim of Appeal Filed

4. The Underlying Facts Necessitating a Complaint

Plaintiff's JoAnn Kusmierz and James Lindebaum ("Jim") are brother and sister, and Plaintiffs Kerry Kusmierz and Kim Lindebaum are their respective spouses. Defendants Joyce Schmitt and Diane Rankin are sisters of Plaintiffs JoAnn and James Lindebaum. Defendant Ronald ("Tobe") Schmitt is the husband of Joyce Schmitt.

The Lindebaum family was headed by Joseph and Elizabeth Lindebaum who raised their nine children, eight girls and one boy, in Bay City, Michigan. Joseph Lindebaum owned and operated M-Supply Company which originally operated out of Bay City, Michigan and was later relocated to West Branch. Joseph Lindebaum

eventually sold the business and a nearby farm to his son, Plaintiff James Lindebaum.

It was evident from the testimony at trial that this dispute was based on more than simple sibling rivalry and jealousy between the nine Lindebaum children. The jealously and hostility between certain siblings escalated during the illness and eventual death of the father, Joseph Lindebaum, and **rose to the point of threats and harassment**, far past a simple "bitter family dispute" as characterized by Defendants, following the death of the mother Elizabeth Lindebaum. Defendants spread their hate through the small community of West Branch.

Both Joseph and Elizabeth planned for the distribution of their estate through the execution of a pour-over will and a revocable trust.[3] (Vol I, Pg 116-117; PX9, DX11, DX12) The nine children were excluded from the will. As a result of Joseph passing on first, Elizabeth received the property; her trust and pour-over will distributed the estate at the time of her death. (PX9; DX11; DX12; Vol I, Pg 89-90) Elizabeth's trust requested that everything in her estate go to charities. (PX12; Vol V, Pg 54)

Joyce and Diane argued that there were life insurance policies and gold in the estate that they were entitled to receive, as well as several personal items. (Vol I, Pg 142-143) Both Joyce and Diane admitted at trial that they had no evidence which would establish that their brother James Lindebaum had knowledge of a $300,000.00

---

[3] Joseph and Elizabeth amended their wills and trusts several times prior to their death. (Vol I, Pg 135) At the time of Elizabeth's death, the 12th Amended Trust was in effect, and at the time of Joseph's death, the 8th Amended Trust was in effect.

life insurance policy, gold bars, or the identified personal items claimed.[4] (Vol I, Pg 125, 142, 167-168, 173, 180) James Lindebaum was not the trustee for Elizabeth Lindebaum's estate, that responsibility was held with the Bank of Alma. (PX9; Vol I, Pg 118) In addition, the Bank of Alma worked with Greg Demers, Joseph and Elizabeth's estate attorney, regarding the distribution of the estate. (Vol V, Pg 46)

Subsequent to the death of Joseph Lindebaum on February 13, 1998, Elizabeth sold the marital residence and distributed the proceeds to various children, grandchildren, and charities.[5] (Vol I, Pg 139; Vol IV, Pg 126-128) In addition to the decision by their mother Elizabeth to distribute her estate while she was still living, Joseph and Elizabeth experienced a tragic event on July 12, 1996 – their home in Bay City burned down unexpectedly. Several personal items were destroyed.

Until Elizabeth passed away on November 7, 1999, she resided with various daughters. There were several arguments during this period of time between Elizabeth, Joyce and Diane. This resulted in Elizabeth amending her will to disinherit her children. Elizabeth, in an effort to avoid inter-family disputes between the children at the time of her death, began distributing her assets.

The harassment by Joyce Schmitt and Diane Rankin towards the Plaintiffs began almost immediately after the death of Elizabeth. Angered by their mother's

---

[4] Despite being concerned about the distribution of property, Diane Rankin never contacted the Bank of Alma. (Vol I, Pg 119, 146) Greg Demers in a letter to all the children specifically explained that the Bank of Alma was the trustee and personal representative. (PX8) The will, PX9, which specifically excludes the children, was enclosed with the Greg Demers letter. In addition, Greg Demers provided an explanation of the distribution. (Vol V, Pg 43-44)

[5] Diane received a $2,000.00 CD by her mother. (Vol I, Pg 118) James Lindebaum did not benefit or receive proceeds from the sale of the house. (Vol IV, Pg 127) Nor did James receive anything from his mother's trust at the Bank of Alma. (Vol IV, Pg 132)

distribution of the assets, they made false allegations that Jim was withholding or converting their inheritance. (Vol VI, Pg 140) A few selected events are:

- Phone calls from Joyce to Jim demanding money and threats to spread the word that James was an embezzler. (Vol IV, Pg 118, 141-142; Vol VI, Pg 140-148)
- Diane drove down Esmond Road, the location of Jim's residence to "watch his every move." (PX 2; Vol II, Pg 48-49)
- Tobe Schmitt went to the Plaintiffs' farm on December 23rd demanding money and threatening to disparage Jim's name in West Branch. (Vol IV, Pg 142)
- Tobe and Joyce went to the Plaintiffs' farm, making threatening statements and demanding money, gold bars, and life insurance policies. (Vol IV, Pg 147-148; Vol VI, Pg 140-148)
- Joyce, Tobe, and Diane contacted Jim and Kim's pastor, Reverand Teall, approximately 30 times by phone and in person, discussing the contents of the letters claiming that Plaintiffs were embezzlers, backstabbers, etc. (Vol II, Pg 93, 189-190; Vol III, Pg 124-125, 128, 130,133, 135-136) The pastor pled with the Defendants to stop the harassment. (Vol III, Pg 134-135)
- Joyce indicated to Pastor Teall that something terrible was going to happen to Jim. Pastor Teall feared that Joyce's threats would come true. (Vol III, Pg 142)

- Joyce left packages at Plaintiffs' place of business, M-Supply Company on Kim's desk. (Vol III, Pg 29) Joyce does not work at M-Supply nor was there a reason for her to enter M-Supply premises other than for harassment.
- Joyce left messages on the Lindebaum telephone about contacting friends and church members to let them know about Jim's embezzlement and that she was going to contact the government. Threats also included "Enjoy your freedom for two more days." (Vol VI, Pg 101; 170-171, 174)
- Threats by Joyce to involve Jim's ex-wife, ex-mother-in-law, and his daughter. (Vol IV, Pg 152)
- Several Letters were sent by the Defendants to the Plaintiffs and given to other brothers and sisters and friends, including Pastor Teall. (PX1; Vol IV, Pg 159; PX5; PX21, PX6)
- Cards from unknown persons were sent to the Lindebaums and Kusmierzs. (Vol IV, Pg 164-165; Vol VI, Pg 18-19; PX5; PX21)
- Unsolicted Playboy magazine subscriptions were sent to the Lindebaums' residence. (PX 23; Vol IV, Pg 166-167)
- Religious documents including highlighting over the commandment "thou shalt not steal" were also sent to the Lindebaums' residence (PX 24; Vol IV, Pg 176)
- Three pounds of nails were thrown in the Lindebaum's driveway. (Vol IV, Pg 178-179)

- Threats were made by the Defendants to contact governmental agencies. (Vol IV, Pg 185)
- Defendants informed several people that James, Kim, JoAnn, and Kerry were embezzlers and other untruths to third parties including Alberta, Reverend Teall, a state trooper, John Voss, the remaining siblings, and Kevin Elliot. (Vol II, Pg 60, 93, 100; Vol III, Pg 43, 50-51; Vol VI, Pg 37, 96-98)
- Allegations were made in the letters that James hurried the death of his parents along.
- Joyce approached Kim on the highway in at a fast speed in a threatening manner. (Vol VI, Pg 154)
- PX15 alone was sent to 17 families.

Prior to filing, the Plaintiffs sought the advice and direction of attorney Skinner. On November 7, 2000, Plaintiffs counsel sent a letter addressed to Defendant Joyce Schmitt demanding that

> YOU AND ANYONE ACTING WITH YOU OR IN CONCERT WITH YOU MUST IMMEDIATELY CEASE AND DESIST FROM PUBLISHING OT UTTERING THE CLAIMS OF 'EMBEZZLEMENT' AND OTHER DEFAMATORY STATEMENTS OR PUBLICATIONS. NEXT, YOU MUST IMMEDIATELY, WITHIN THE NEXT 30 DAYS COMMUNICATE TO ALL PERSONS THAT YOU ARE WITHDRAWING SUCH STATEMENTS, AND REQUEST THAT THEY DISREGARD ANYTHING YOU HAVE SAID THAT IS SLANDEROUS ABOUT YOUR BROTHER, HIS WIFE, OR THE M SUPPLY COMPANY. (PX 13)

Diane admitted at trial that she was aware of the letter from attorney Skinner requesting that the behaviors set forth above cease and desist or that she might be sued. (Vol II, Pg 35)

This letter did not deter the Defendants' conduct. The unsolicited mail and letters from unknown individuals all arrived after the November 17, 2000 letter sent by attorney Skinner. (PX 13) In addition, the letters from Diane and Joyce continued. (Vol IV, Pg 177; PX 2, 4, 3, 7, 21, 21b) The Defendants did not withdraw their statements.

As stated by James Lindebaum: "Their harassment has – has heightened so high, it was not slowing down, it was not stopping, it was escalating. The pattern completely changed; now instead of kind of being out in the open, if you'll have it that way, we were starting to get this kind of mail delivered from whoever, at whatever time.."(Vol IV, Pg 177)

The situation continued to escalate. West Branch is a small city and slanderous statements in a small community have large impacts on business dealings and reputation.

At one point, Joyce even contacted Kevin Elliot, the insurance agent for M-Supply Company. (PX 30 and 31)

The complaint in this case was filed on June 5, 2001 as a result of the pattern of harassment initiated by Defendants that simply would not stop. (Exhibit D) Even after the lawsuit was filed, the acts of the Defendants' continued. Defendant Joyce Schmitt informed Pastor Teall following the filing of the lawsuit that Tobe was going to go ballistic. Pastor Teall contacted Jim who raced home to lock himself and his wife,

Kim, in the house. Ronald Schmitt had a firearm and Jim was concerned for his safety. (Vol IV, Pg 181-182)

The jury trial was conducted in this matter beginning on April 1, 2003 and ending on April 17, 2003. The trial court directed a verdict in favor of the Plaintiffs Kim and James Lindebaum and against the Defendants Joyce Schmitt, Ronald Schmitt, and Diane Rankin as to the Plaintiff's claim on defamation per se. The Court further entered a directed verdict against Diane Rankin as to Kerry and JoAnn Kusmierz for defamation per se. Joyce and Diane were also liable to Kim and Jim for Invasion of Privacy and Intentional Infliction of Emotional Distress. Diane was further liable to the Kusmierzs on both counts. The jury issued a verdict as to the remaining issues and damages on April 17, 2003. (Exhibit E and F)

The damages including economic and noneconomic are set forth in the table.[6]

	Kim Lindebaum	James Lindebaum	Kerry Kusmierz	JoAnn Kusmierz
Joyce Schmitt	$5,000.00	$4,000.00		
Ronald Schmitt	$0	$2,000.00		
Diane Rankin	$5,000.00	$4,000.00	$1,000.00	$1,000.00

5. The Injunction

Plaintiffs' complaint and amended complaint requested all damages which arose during the course of discovery. (Exhibits D and G, ¶ 37) The Court was informed at the initial pretrial hearing on September 17, 2001 that Plaintiffs may request injunctive relief at the conclusion of the trial. (Exhibit H) Answers to

interrogatories further establish that damages sought included injunctive relief. (Exhibits I)

On May 5, 2003, subsequent to the jury trial, but prior to the entry of the February 10, 2004 Judgment (Exhibit E), Plaintiffs filed a motion for a permanent injunction pursuant to MCR 3.310(H). The hearing was held on June 5, 2003. The trial court rendered a written opinion and order on December 19, 2003 granting Plaintiffs' request for injunctive relief indicating: "This Court recognizes the fact that injunctive relief was not specifically requested in either Complaint, but finds that it has authority to enter such an order in the interest of justice." (Exhibit J) On February 9, 2004, the trial court issued an Order for Injunctive Relief which shall remain in effect for three years. (Exhibit K)

The trial court's decision to grant the injunctive relief pursuant to MCR 3.310(H) was not on appeal.

6. Case Evaluation Sanctions

The complaint in this matter was filed on June 5, 2001. Pursuant to the order of the trial court, the case was submitted to case evaluation on June 20, 2002 in accordance with MCR 2.403. The case evaluation panel determined that Plaintiffs had no cause against Ronald Schmitt; the jury disagreed and awarded Plaintiff James Lindebaum $2,000.00 against Ronald Schmitt. The case evaluators awarded an aggregate of $17,500.00 to the Plaintiffs against Joyce Schmitt. The jury awarded $9,000.00. The case evaluation panel determined that the Plaintiffs had a cause

---

[6] This table is not the adjusted verdict, only the jury verdict.

against Diane Rankin and awarded the Plaintiffs an aggregate of $7,500.00. The jury awarded $11,000.00. (Exhibit E and L) The parties stipulated at case evaluation that the Plaintiffs would be treated as a single unit. This is not in dispute and recognized by the Court of Appeals.

Including prejudgment interest through March 1, 2003, Diane Rankin was held liable to Plaintiffs in the amount of $12,536.43, Joyce Schmitt was held liable for $10,254.59, and Ronald Schmitt was held liable for $2,280.86.[7] (Exhibit E)

Both Joyce Schmitt and Diane Rankin rejected case evaluation. The trial court further awarded equitable relief in favor of the Plaintiffs and against the Defendants in the form of a permanent injunction entered February 9, 2004 and expiring February 9, 2007 as set forth *supra*. (Exhibit K)[8]

Following the entry of the Court's final judgment, the Plaintiffs filed their motion for assessment of case evaluation sanctions. Between the date of case evaluation, June 20, 2002, and the date of filing the motion for case evaluation sanctions, March 9, 2004, attorney fees were $82,223.60. (Exhibit N)

Plaintiffs maintained that in light of both the adjusted monetary award and the injunctive relief, Defendants Joyce Schmitt and Diane Rankin were liable for case evaluation sanctions pursuant to MCR 2.403. The motion for case evaluation

---

[7] The specific findings of the jury are not relevant for this application; however, the Judgment and verdict forms are attached to provide additional details regarding the juries' specific findings.

[8] Clearly as to Diane, Plaintiffs as an aggregate were entitled to case evaluation sanctions. The trial court determined that it could not divide Plaintiff's attorney fees between Defendants because the same amount of work was required regardless of the number of named Defendants. The trial court held that Defendants could seek contribution from one another in a separate suit. Diane paid the majority of the sanctions. (8-31-04 Motion at 16-17) The Court of Appeals has now directed the trial court on remand to determine the attorney fees incurred to Diane and Joyce as a result of legal work

sanctions was argued before the trial court and taken under advisement on May 7, 2004; the court's ruling was announced during further proceedings subsequently conducted on July 6, 2004. (Mot 7-6-04, Pg 18-21) The trial court agreed that Plaintiffs were the prevailing party, deducted the amount of attorney fees awarded by the jury in their verdict, and awarded $67,259.60 case evaluation sanctions. (Exhibit B)[9] The hourly rate was not appealed. In ruling that the Plaintiffs were the prevailing party, claims by Defendant Joyce Schmitt for case evaluation sanctions were rejected. (Exhibit M)[10]

At no time during the appeal process or arguments to the trial court did Defendants claim that Defendant Diane Rankin had a right to case evaluation sanctions. The Court of Appeals has now awarded Diane Rankin case evaluation sanctions. *See* Defendants' Appellee Brief and Exhibit R. In Exhibit R, Diane rankin specifically "she does not intend to appeal or further challenge that Order," referring to the Order for case evaluation sanctions. Stating further "It is the intention that the funds be disbursed to the persons indicated."

7. Collection Efforts

Collection efforts on the judgment began immediately after the order was entered on February 10, 2004 when Plaintiffs requested the issuance of garnishments against the Defendants. Prior to the order for case evaluation

---

caused by JoAnn and Kerry, the trial court has already determined that the division of attorney fees is not possible.

[9] The trial court reduced the $82,223.60 by the $10,000.00 in attorney fees awarded at trial pursuant to MCLA 600.2911, and further reduced the fees for duplicative services.

sanctions, Defendants Joyce and Ronald Schmitt paid the judgment, including interest, in full. (Exhibit O)

Defendant Rankin refused to make any payments on the judgment against her. Defendant Rankin further made discovery difficult by failing to produce requested documents. Between February 10, 2004 and August 31, 2004, Plaintiffs discovered that Defendant Rankin was expected to receive life insurance in the amount of $130,000.00 from Primerica Life Insurance Company. On July 26, 2004, Plaintiffs obtained a garnishment from the trial court including both the amount owed by Defendant Rankin from the judgment and the expected amount of case evaluation sanctions. (Exhibit P) Defendants filed objections to the garnishment and Plaintiffs filed a motion for restraining order to hold the funds until the issues could be properly resolved by the court.

On August 11, 2004, the trial court entered an amended order[11] to hold funds in escrow and release remaining funds. (Exhibit Q) The order states that Plaintiffs shall submit a garnishment to obtain funds from Primerica Life Insurance Company in the amount of $92,063.52 and that said funds should remain in the IOLTA account of Skinner Professional Law Corporation. Plaintiffs' position was that the funds should be held until the trial court entered an order for case evaluation sanctions.

---

[10] The original order was amended to clarify the trial court's ruling that Defendant Joyce Schmitt's motion for case evaluation sanctions was denied.

[11] The original order to hold funds indicated that Skinner Professional Law Corporation would hold the funds; however, Defendant Rankin requested that the amount in excess of the $92,063.52 due and owing from Primerica Insurance Company be forwarded to her. The parties stipulated to the amendment after agreeing that attorney Holmes would maintain an additional $2,000.00 in his escrow account for future case evaluation sanctions. The $2,000.00 was returned to Diane Rankin.

On August 25, 2004, Primerica sent a fax to Defendants attorney, George Holmes, indicating that it was in receipt of the Order to Hold Funds in Escrow and Release Remaining Funds and that before disbursement could be made, **Primerica needed verification that Diane Rankin did not intend to appeal or further challenge the order.** (Exhibit R) On or about August 27, 2004, a check was received by Skinner Professional Law Corporation in the amount of $92,063.52 from Primerica. (Exhibit S) In addition, $2,000.00 was disbursed to attorney Holmes to be placed in his escrow, and the remaining funds were paid to Defendant Rankin. (Exhibit M)

On August 31, 2004, the trial court issued the order for case evaluation sanctions against Diane Rankin and Joyce Schmitt in the amount of $67,259.60 for reasonable attorney fees and $532.30 for costs. (Exhibit B) Plaintiffs prepared a spreadsheet of the amount due and owing including the judgment of Diane Rankin and the entire amount of case evaluation sanctions which totaled $80,545.74.[12] (Exhibit T) The difference in the $92,063.52 and $80,545.74 was immediately returned to Defendant Rankin on September 7, 2004. (Exhibit U) Plaintiffs were also issued a check at this time.

Plaintiffs received a letter on September 8, 2004 from attorney Holmes indicating that the check was received, "representing the excess over the amount owing in the Judgment, with interest, costs, and Case Evaluation Sanctions." (Exhibit V) Attorney Holmes further indicated:

> With the application of the funds obtained through the Writ, the Judgment has now been paid in full. It is up to the Defendants to sort out their respective responsibilities inter se, as the Order for Case Evaluation Sanctions provided for joint and several liability.
>
> Consequently, a Satisfaction of Judgment in full is now in order.
>
> Please execute the enclosed Satisfaction of Judgment, see that it is filed, and provide copies to me and Attorney Schrope.

(Exhibit V) This was completed as requested.

Standard of Review

The trial court's decision whether to award mediation sanctions is reviewed for an abuse of discretion. *See Great Lakes Gas Transmission v Markel,* 226 Mich App 127; 573 NW2d 61 (1997). *See also J. Gordon Gaines, Inc. v 221*, Inc, 2000 WL 33421256 (*Unpublished Michigan Court of Appeals- Exhibit W*) (indicating that the trial court had discretion in determining whether to award sanctions because the verdict included an award of equitable relief.) *See also Brandon v Klinske,* 1998 WL 1997691 (*Unpublished Michigan Court of Appeals- Exhibit X*) citing *Great Lakes Gas Transmission v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997) (The trial court's decision whether to award mediation sanctions under MCR 2.403(O)(5) is

---

[12] The trial court determined that the defendants would have to decide how they would individually contribute to damages. (8-31-04 Motion at Pgs 16-17)

reviewed for an abuse of discretion.) *See also Price Co. v D & T Const. Co., Inc.*, 1997 WL 33343944 (*Unpublished Michigan Court of Appeals—Exhibit Y*).[13]

Issues involving interpretation of a court rule present a question of law that are reviewed de novo. *Marketos v. American Employers Ins Co,* 465 Mich. 407, 412; 633 NW2d 371 (2001).

Regarding issues of waiver and standing, as stated in *Morales v. Michigan Parole Bd.*, 260 Mich App 29, 676 NW2d 221 (2003), "this Court's duty is to consider and decide actual cases and controversies." *Federated Publications, Inc. v. City of Lansing,* 467 Mich. 98, 112, 649 N.W.2d 383 (2002). "To that end, this Court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us unless the issue is one of public significance that is likely to recur, yet evade judicial review." *Id."* Whether a party has standing is a question of law. The Court reviews questions of law de novo. *Stitt v. Holland Abundant Life Fellowship,* 462 Mich. 591, 595, 614 N.W.2d 88 (2000) . *See also National Wildlife Federation v Cleveland Cliffs Iron Co.*, 471 Mich 608, 684 NW2d 800 (2004).

---

[13] MCR 2.403(O)(5) is not the only exception to de novo review. The appellate court reviews the trial court's decision for an abuse of discretion where the interest of justice standard is applied pursuant to MCR 2.405(O)(11). *See Harbour v Correctional Medical Services, Inc.*, 266 Mich App 452, 702 NW2d 671 (2005).

Discussion of Law

I. MCR 2.403(O)(4) DOES NOT REQUIRE THE TRIAL COURT TO DETERMINE THE PREVAILING PARTY BY COMPARING THE CASE EVALUATION AWARD TO THE JURY VERDICT BEWTEEN EACH PAIR OF PLAINTIFFS AND DEFENDANTS USING THE FOLLOWING FORMULATION:

EACH PLAINTIFF'S PROPORTION/PERCENTAGE OF THE TOTAL JUDGMENT IS MULTIPLED BY THE ADJUSTED TOTAL JUDGMENT AND COMPARED TO PLAINTIFF'S PORTION OF THE CASE EVALUATION AWARD WHICH IS DETERMINED BY DIVIDING THE TOTAL AMOUNT AWARDED AGAINST A DEFENDANT DIVIDED BY THE NUMBER OF PLAINTIFFS.

MCR 2.403(H)(4) allows members of a single family to elect to treat the action as one claim with the payment of one fee and the rendering of one lump-sum award to be accepted or rejected. The parties in this case stipulated that the Plaintiffs would be treated as a single party – this is not in dispute. There are no cases interpreting this court rule. Stipulations are agreements between the parties and are consequently construed as contracts. *Phillips v. Jordan,* 241 Mich.App 17, 21; 614 NW2d 183 (2000). Neither party requested that the stipulation be set aside.

The parties abided by this agreement paying only one case evaluation fee pursuant to MCR 2.403(H)(4) and the Plaintiffs and Defendants being required to accept or reject in toto. Additionally, both parties rejected the evaluation award believing that they had the better position and took the risk that they would either receive or have to pay case evaluation sanctions depending on the outcome. This is

discussed further infra and at this point, Plaintiffs should not be denied the benefit of the risk that all parties acknowledged and accepted.

In the instant case, both sides are prejudiced by the Court of Appeals unilateral decision to set aside the parties stipulation that Plaintiffs are treated as a single party. The case evaluators relied upon this stipulation and awards were not set between each pair of parties, now the Court of Appeals is mandating comparison of separate awards which did not occur. By doing this, the specific harm to each Plaintiff by each Defendant was not considered. Instead the Court of Appeals treated each party equally and divided the case evaluation award by 5 without factual basis or legal support.

The case evaluation divided by "5" was then compared to a percentage of the total verdict. This makes no sense. If the Court is going to require such a comparison, it needs to also take into consideration the amount or percent harm caused to each party. This would need to be done by the trial court since it was privy to all the testimony and evidence and is in the best position to determine what percentage should be assigned to each party. Further, if the court were to require such a comparison, why in this manner? Why not determine the amount of case evaluation sanctions by using the same percentage as the percentage used with regard to the adjusted verdict, or the percent assigned by the jury? The answer is because this has not been thought out and there is no authority for this manner of calculation.

Most importantly, the decision by the Court of Appeals to require comparisons between pairs is not incorporated into the court rules. Even if the parties had not

stipulated to be treated as a single unit, MCR 2.403(O)(4)(a) regarding multiple parties does not include the elaborate calculation formulated by the Court of Appeals.

The Court of Appeals concluded that MCR 2.403(O)(4) required an apportionment of the lump-sum made under MCR 2.403(H)(4) overlooking the fact that (H)(4) treats multiple plaintiffs as a single claim if this is elected.

II. IT WAS FAIR UNDER ALL OF THE CIRCUMSTANCES TO AWARD CASE EVALUATION SANCTIONS AGAINST THE DEFENDANTS AFTER TAKING INTO CONSIDERATION INJUNCTIVE RELIEF PURSUANT TO MCR 2.403(O)(5) BECAUSE (1) THE COURT RULE DOES NOT MANDATE THAT THE CASE EVALUATORS CONSIDER EQUITABLE RELEIF AND (2) BECAUSE ATTORNEY FEES ARE AWARDABLE UNDER MORE THAN ONE STATUTE AND COURT RULE AS LONG AS THE AGGREGATE AWARD DOES NOT EXCEED THE ACTUAL ATTORNEY FEES INCURRED.

Plaintiffs at no time hid the fact that they were seeking injunctive relief. The trial court was informed during the September 2001 pretrial hearing and the trial court noted the request for injunctive relief in the pretrial statement. (Exhibit H) Further, a request for injunctive relief was set forth **by each Plaintiff in their individual response** to answers to interrogatories. (Exhibit I) See also Exhibits D and G, ¶ 37. The equitable injunctive relief was best decided by the court after the completion of all the proofs.

As a result of Defendants egregious behavior and pursuant to MCR 2.403(O)(5), it was appropriate under the circumstances in this case to award case evaluation sanctions. The trial court agreed. Defendants through their behavior necessitated this lawsuit. Plaintiffs' primary goal was injunctive relief to end the

slander, libel, and harassment. (Exhibit D, G, I; PX 13; Vol VI, Pg 179-180) Plaintiffs through the November 7, 2000 letter from attorney Skinner demanded that the conduct stop, Defendants ignored this request and the promise of the Plaintiffs that a lawsuit would be filed.

MCR 2.403(O)(5) provides:

> (5) **If the verdict awards equitable relief**, costs **may** be awarded if the court determines that
>
> (a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and
> (b) it is fair to award costs under all of the circumstances.

The Court of Appeals properly determined that the **trial court could consider equitable relief pursuant to MCR 2.403(O)(5)**, but then reverses and remands the trial court's decision maintaining that an award for sanctions was not "fair under all of the circumstances." The Court of Appeals reasoned that because the case evaluators had not considered equitable relief, an award was not fair, and further, the jury had already awarded attorney fees in the verdict pursuant to MCLA 600.2911(7). There was no finding by the Court of Appeals that the trial court abused its discretion as required to reverse an award for mediation sanctions. The trial court was in the best position to determine whether sanctions should be awarded pursuant to MCR 2.403(O)(5), it was intimately involved in the case, and in the best position to assess sanctions. *See BJ's & Sons Const. Co., Inc., v Van Sickle*, 266 Mich App 400, 415; 700 NW2d 432 (2005).

The Court of Appeals reasoning is incorrect for two reasons, both based on misinterpretations of the court rules. First, the Michigan court rules to not mandate

that the evaluators consider equitable relief in order for the trial court to consider equitable relief pursuant to MCR 2.403(O)(5). Second, attorney fees are awardable under more than one statute as long as the aggregate award does not exceed actual attorney fees.

A decision regarding interpretation of the court rules is reviewed de novo. *Marketos v. American Employers Ins Co,* 465 Mich. 407, 412; 633 NW2d 371 (2001).

1. **The Court Rules Do Not Mandate that the Evaluators Review Potential Equitable Relief When Setting An Evaluation Amount**

The Court of Appeals interprets, without basis, that if the case evaluators do not take into consideration equitable relief, the court cannot take into consideration equitable relief.

> MCR 2.403 (K)(3) states:
>
> The evaluation may not include a separate award for equitable relief, but the panel **may consider such claims** in determining the amount of the award.

In *Accetture v Nordman*, 2000 WL 33401848 (*Unpublished Michigan Court of Appeals-Exhibit Z*), the mediators ordered that each Plaintiff pay $30,000.00 and did not address any requests for equitable relief. All parties rejected the mediation. The Court indicated that it must assume that all the issues were presented to the panel. The mediation panel is not required to indicate whether there was a consideration for equitable relief. *Id.* citing MCR 2.403(K)(3).

See also Dane Const., Inc. v Royal's Wine & Deli, Inc., 192 Mich App 287 (1991), stating that Plaintiff is able to seek alternate remedies. In *Dane*, the trial court held that the mediation was accepted by the parties. The mediation awarded only monetary damages and a judgment was entered accordingly. However, the trial court further held that the entry of judgment based on the mediation award did not preclude Plaintiff from requesting equitable relief, in that case, enforcement of a construction lien. The Appellate Court held "Although the mediation panel could have considered plaintiff's equitable claim in determining the amount of damages, it could not make a separate award for equitable relief. MCR 2.403(K)(3); *R.N. West Construction Co. v. Barra Corp. of America, Inc.,* 148 Mich.App. 115, 117-118, 384 N.W.2d 96 (1986). Therefore, the mediation evaluation and the resulting judgment could not have provided relief on plaintiff's claim for foreclosure under the construction lien." *Id* at 293.

This issue is also specifically addressed in *Linden Inv. Co. v. Minca*, 1999 WL 33435355 (*Unpublished Michigan Court of Appeals- Exhibit AA*), where the Plaintiff sought both monetary and equitable relief. In *Minca*, Plaintiff filed a quiet title and slander of title action against several Defendants. The case was mediated in March 1996, and the evaluators awarded a judgment of foreclosure in favor of plaintiffs against defendants' interests, with no money damages to any party. Plaintiffs accepted and Defendants rejected the award. After a bench trial, the Court quieted title but did not award money damages, the same award as the mediation. Plaintiff sought mediation sanctions against the Defendants. Defendants Frens, husband

and wife, argued that the court erred in awarding mediation sanctions against them.

The Court stated:

> The purpose of the mediation sanction rule, MCR 2.403(O), is to encourage settlement by placing the burden of litigation costs on the party who insists upon trial by rejecting the proposed mediation award. *Forest City Enterprises, Inc v. Leemon Oil Co*, 228 Mich.App 57, 78-79; 577 NW2d 150 (1998). A case is appropriate for mediation if it is a civil case where the relief sought is primarily money damages or division of property. MCR 2.403(A)(1); *Forest City*, *supra* at 79. A mediation panel can determine an equitable claim when determining the amount of damages, but it is not proper for a mediation panel to make a separate award for equitable relief. MCR 2.403(K)(3); *Forest City*, *supra.* However, where the court's verdict includes equitable relief, costs may be awarded pursuant to MCR 2.403(O) if the court determines that 1) taking into account both the monetary and the equitable relief, the verdict is not more favorable to the rejecting party than the evaluation, and 2) it is fair to award costs under all of the circumstances. MCR 2.403(O)(5); *Forest City*, *supra* at 79.
>
> .....
>
> Here, the proper portion of the evaluation was zero. The verdict awarded plaintiffs zero damages with respect to the slander of title claim. Pursuant to MCR 2.403(O)(3): "If the evaluation was zero, a verdict finding that the defendant is not liable to the plaintiff shall be deemed more favorable to the defendant." While the portion of the verdict awarding no damages to plaintiffs with respect to their slander of title claim was more

> favorable to defendants, when the equitable relief awarded by the verdict is considered along with the legal relief, MCR 2.403(O)(5), it cannot be said that the entire verdict was more favorable to defendants than the mediation evaluation. Furthermore, we believe that it was "fair to award costs under all of the circumstances." MCR 2.403(O)(5)(b). We therefore conclude that the trial court did not err in awarding mediation sanctions against the Frens.

Similarly, in *C.A. Muer Corp. v Zimmer*, 1997 WL 33344470 (*Unpublished Michigan Court of Appeals- Exhibit BB*), a jury awarded monetary damages and the trial court awarded a permanent injunction. In *Zimmer*, Plaintiff requested "whatever other relief in favor of Plaintiff that the Court deems appropriate." The case evaluation award was $3,000.00. The jury awarded $2,500 in damages and the court awarded a permanent injunction. The Court of Appeals reiterated that:

> If defendant had accepted the mediation evaluation, then the judgment would have been "deemed to dispose of all claims in the action and [would have] include[d] all fees, costs, and interest to the date of judgment." MCR 2.403(M)(1). Thus, **defendant's rejection of the mediation recommendation made her susceptible to the liability of incurring costs, including the costs necessary to obtain plaintiff's equitable relief**. MCR 2.403(O)(5).

In the instant case, it was reasonably foreseeable that an injunction would be sought. It is the ultimate verdict that determines whether case evaluation sanctions are appropriate. The Plaintiffs in this case were forced to proceed to trial to obtain equitable relief. This action is supported further by the mere fact that Defendants filed

a lawsuit during these proceedings making further claims that Plaintiff James Lindebaum hid gold, exerted undue influence over his mother's trust, breached fiduciary duties, etc.[14] (Exhibit CC) Similar to *Zimmer*, the jury awarded monetary damages and the court ordered a permanent injunction.

MCR 2.403(O)(5) is an exception to the general rule set forth in MCR 2.403(O)(1) and is applicable to situations where equitable relief is awarded. Specific statutory language prevails over inconsistent general language. *Jones v. Enertel, Inc.,* 467 Mich. 266, 270-271, 650 N.W.2d 334 (2002). MCR 2.403(O)(1) is applicable to monetary judgments only, evident by the clear language of 2.403(O)(5) which specifically carves out a specialized rule for cases where equitable relief is granted. The trial court can determine that based on both equitable and monetary relief, the verdict is not more favorable to the rejecting party, and then award costs where it is fair under all the circumstances.

In the instant case, the Court of Appeals stated it was not fair because the evaluators did not take into consideration equitable relief. MCR 2.403(K)(3) does not mandate that evaluators review equitable requests for a party to receive case evaluation sanctions. Taking into consideration the monetary relief of $23,315.54 and the three year permanent injunction, the trial court determined that this was not more

---

[14] On or about November 5, 2002, the Defendants in this case filed a complaint in Ogemaw County against James Lindebaum as further harassment claiming undue influence of the parents' estate. This suit was filed more than three years after the death of Elizabeth Lindebaum. This case was dismissed in April 2004 with prejudice by stipulation of the parties. Defendants apparently filed this lawsuit in order to testify at trial that they were investigating their unsupported allegations of "embezzlement" of Joseph and Elizabeth Lindebaum's estate.

favorable to the rejecting Defendants, Joyce Schmitt and Diane Rankin.[15] Once determining that the award was not more favorable, pursuant to MCR 2.403(O)(5), "costs may be awarded" if the trial court determines that it is fair to award costs under all the circumstances.

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v. Wilkes,* 470 Mich. 661, 665; 685 NW2d 648 (2004). When the language of the rule is clear and unambiguous, the court must enforce the meaning plainly expressed. *Grievance Administrator v. Underwood*, 462 Mich. 188, 193-194, 612 N.W.2d 116 (2000). If construction is necessary, the first principle guiding a review is to apply the plain language of the rule, giving effect to the ordinary meaning of the words used in light of the purpose to be accomplished. *Dessart v. Burak*, 252 Mich.App. 490, 497; 652 N.W.2d 669 (2002); *Dykes v. William Beaumont Hosp.*, 246 Mich.App. 471, 484; 633 N.W.2d 440 (2001).

When two statutes or provisions conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. *Gebhardt v. O'Rourke,* 444 Mich. 535, 542- 543; 510 NW2d 900 (1994); *People v. Hendrick,* 261 Mich.App 673, 679; 683 NW2d 218 (2004).

---

[15] Defendants meet the 10% rule against Diane Rankin. MCR 2.403(O)(3). Case evaluation was $7,500.00 and the jury awarded $11,000.00. The injunction is primarily an issue with Joyce. The Defendants specifically requested to be treated separately at case evaluation. (Exhibit K) Defendants attempt to treat Diane and Joyce aggregately on appeal; however, if this Court determines that the trial court should not have considered equitable relief, Plaintiff maintains that the sanctions against Diane should be affirmed. MCR 2.403.

In the instant case, MCR 2.403(K)(3) and (O)(5) do not contradict. Both are specific and both prevail in this case. The statutory language is clear and unambiguous.

MCR 2.403(O)(5) is not the only exception to MCR 2.403(O)(1). MCR 2.403(O)(11) is the interest of justice exception; the exception also provides the trial court with the discretion to award or deny case evaluation sanctions. Both the *Minca* and *Zimmer* Court's, *supra*, recognized the same reading as the Honorable Caprathe in the case at bar.

Defendants Joyce Schmitt and Diane Rankin acted in an intentional manner to defame the reputations of Kim and James Lindebaum, and JoAnn and Kerry Kusmierz. Although the aggregate actual monetary award was less than the case evaluation award, taking into consideration the equitable award entered on behalf of all the Plaintiffs, the award is not more favorable to the Defendants and under the circumstances it would be only fair to treat the Plaintiffs as the prevailing party and award them costs incurred in this lawsuit.

2. Case Evaluation Sanctions Are to Be Assessed By The Trial Court Separately from Statutory Attorney Fees included in the Judgment and Can Include Attorney Fees Provided that the Total Recovery for Attorney Fees Does Not Exceed 100% of Fees Actually Incurred

McAuley v General Motors Corp., 457 Mich 513, 578 NW2d 282 (1998) specifically addressed this issue. The Michigan Supreme Court held that where

statutory attorney fees were awarded, MCR 2.403 could be utilized to obtain 100% of the attorney fees incurred.

In *McAuley*, Plaintiff filed suit against GMC and MESC under the Handicapper's Civil Rights Act. The mediators awarded Plaintiff $12,500 against Defendants jointly and severally. The jury returned a no cause against GMC and awarded Plaintiff $15,000 against MESC. Plaintiff's attorney fees after the trial were $64,746.25. The Court determined the reasonableness of the Plaintiff's attorney fees, reduced the $64,746.25 by the fees incurred pursuing the claim against GMC, reduced the fees for duplicative work incurred from substituting attorneys, and Plaintiff was awarded $25,281.25 in attorney fees pursuant to the Handicapper's Civil Rights Act, MCLA 37.1606(3). MCLA 37.1606(3) states that damages, pursuant to the act, include "reasonable attorneys' fees."

After the judgment for $40,281.25 was entered, the verdict plus the attorney fees, Plaintiff sought to obtain mediation sanctions against Defendant MESC. The Court held once the Plaintiff has recovered 100% of his or her reasonable attorney fees, MCR 2.403 could not be utilized to recover additional or double recovery. However, MCR 2.403 could be utilized to obtain 100% of the reasonable attorney fees.

Haliw v City of Sterling Heights, 257 Mich App 689, 669 NW2d 563 (2003) overruled on other issues in *Haliw v. City of Sterling Heights*, 471 Mich. 700, 691 N.W.2d 753 (2005), sets forth the amount of attorney fees recoverable citing the *McAuley* case and also, referencing *Rafferty v. Markovitz,* 461 Mich. 265, 272-273 and n. 6, 602 N.W.2d 367 (1999) stating:

> Moreover, our Supreme Court has explicitly recognized that actual, reasonable **attorney fees may be obtained under MCR 2.403(O) even where a statute also provides for the recovery of attorney fees, provided that the prevailing party receive no more than actual and reasonable fees**. See *Rafferty v. Markovitz*, 461 Mich. 265, 272-273 and n. 6, 602 N.W.2d 367 (1999), and *McAuley v. Gen. Motors Corp.*, 457 Mich. 513, 578 N.W.2d 282, 284 (1998).' The *Rafferty* Court followed *McAuley* but repudiated its dicta that a double recovery of attorney fees may be possible in certain cases. *Rafferty*, *supra* at 272-273 and n. 6, 602 N.W.2d 367. In sum, that one rule may permit the recovery of reasonable attorney fees, i.e., sanctions for frivolous claims or defenses authorized by statute, M.C.L. § 600.2591, and by court rules, MCR 2.114; MCR 2.625(A)(2), or for a vexatious appeal under MCR 7.216(C), does not preclude the application of MCR 2.403(O), provided a litigant has not already recovered all of its reasonable attorney fees under the other rule.

In the instant case, it is clear that 100% of reasonable attorney fees have not been awarded. First, Defendants have not objected to Plaintiffs' attorneys' hourly rates, nor have they argued that any fees are duplicative. The only objection made by the Defendants is that equitable relief should not be taken into consideration in the determination of who is the prevailing party. This is completely incorrect and contradictory to the clear language set forth in MCR 2.403(O).

The case law clearly requires the trial court to determine the reasonable amount of attorney fees and then deduct any attorney fees previously awarded when

it awards mediation sanctions to prevent "double dipping." This premise does not negate the requirement under the mediation sanction rule that sanctions are mandatory; it simply prevents a prevailing party from receiving more than 100% of the reasonable amount of attorney fees as determined by the Court.

In the case at bar, the trial court followed the statute. MCR 2.403 provides no ambiguity with respect to the issues at bar. The Court of Appeals has essentially reversed precedent set forth by the Michigan Supreme Court and re-written the Michigan Court Rules.

The only basis for reversal according to the Court of Appeals was (1) the case evaluators have to review equitable requests for a party to receive case evaluation sanctions, and (2) a party cannot receive case evaluation sanctions where attorney fees were awarded as part of the judgment.

3. Trial Court's Reliance on the Injunctive Order Was Fair Under All The Circumstances

The trial court's decision was far from shocking and unfair. Defendants showed up at trial and for the first time admitted that their conduct was wrong and inappropriate after four years of litigation and the filing of the Ogemaw County lawsuit. (Exhibit CC) Defendants' conduct forced this case to trial. Defendants rejected case evaluation, denied their liability, and caused Plaintiffs substantial expense subsequent to case evaluation.

Defendants falsely accused the Plaintiffs of criminal acts and unchaste behavior. Plaintiffs' attorney sent a letter requesting the termination of Defendants'

actions. Letters, phone calls, threats, demands, unsolicited cards and magazines, involvement of business contacts, the Plaintiffs' pastor and friends required nothing less than the injunctive relief ordered by the Honorable Caprathe.

The malicious acts and intentions of the Defendants to ruin the Plaintiffs were evident at trial. Defendants admitted in their own trial brief that their acts constituted defamation per se.

Defendants were well aware of the damages sought by the Plaintiffs. They were clearly disclosed on several occasions. Defendants could have requested that the evaluators take the injunctive relief into consideration; Defendants could have even offered to settle at the very beginning of this case by offering injunctive relief. This never happened. There were never additional claims added subsequent to case evaluation.

The Court of Appeals did not find that the trial court abused its discretion in awarding case evaluation sanctions. Rather, the sole decision of reversal was based on inaccurate interpretations of the Court Rules. Because evaluators are not required to take into consider equitable relief and because attorneys fees can be awarded under more that one statute, the decision of the Court of Appeals must be reversed and the decision of the trial court reinstated.

III. DEFENDANTS WAIVED THEIR RIGHT TO APPEAL BY SATISFYING THE JUDGMENT AND ORDER FOR CASE EVALUATION SANCTIONS IN FULL

By choosing to satisfy the amount due and owing in full rather than request a stay and post an appeal bond, Defendants Joyce Schmitt and Diane Rankin eliminated the requirement of case and controversy.

Diane Rankin has never requested sanctions and has waived her appeal to the sanctions awarded against her. (Exhibit R) Exhibit R is consistent with the request that Plaintiffs sign a Satisfaction of Judgment after they received the case evaluation sanctions and judgment.

The judgment and sanctions having been satisfied, there is nothing left for the appellate court to review. The Defendants have essentially discharged the orders entered by the trial court. As a result of Defendants satisfaction on the amount ordered by the trial court, Defendants have waived the right to appeal. Plaintiffs request that the Court of Appeals decision is dismissed and orders of the trial court affirmed.

In *Horowitz v Rott*, 235 Mich. 369, 209 NW 131 (1926), the Michigan Supreme Court reviewed for the first time whether the appellate court may review a judgment which has been satisfied and no longer exists. In *Horowitz*, following a trial for summary proceedings to recover possession on premises sold under an executory land contract, plaintiff recovered and defendant paid plaintiff the amount due in full. Defendant, subsequent to payment, filed an appeal.

The Michigan Supreme Court held "the judgment in the circuit court having been satisfied, there is nothing before us to review; nothing upon which a writ of error can operate." *Horowitz,* 235 Mich. at 370. The Horowitz Court relied upon *Ideal Furnace Co. v. Molders' Union*, 204 Mich. 311, 169 NW 946 (1918), where one Murray had been fined $10 for contempt, paid the fine, and then sought review:

> We are convinced that upon this record the questions are purely academic; **that no real and substantial controversy is before us**; that the order of the court below having been satisfied and the fine paid, **no relief can be now granted appellant**. The defendant, by his own act, has discharged the order entered by the court below. There is nothing before us for determination.
>
> ---
>
> **The fact that the payment was made under protest is of no moment.** If it were otherwise, the rule would be of no value, because by simply paying under protest every case which has become moot could be here heard, and jurisdiction to hear them could be forced upon the court at the will of a party.

Horowitz, 235 Mich. at 371.

The *Horowitz* Court further indicated that when the judgment was rendered, two courses were open to defendant. **He could satisfy the judgment or review it in this court; he could not do both.** *Id.*

The concept that satisfaction of a judgment brings the case to an end and supports the constitutional requirement that there must be an actual case and controversy continues to be followed and strictly construed as an essential backbone of the American Justice System.

Recently, in *Joachim III v LSM Family Trust*, 2004 WL 1392571 (*Unpublished Michigan Court of Appeals- Exhibit DD*), the Court of Appeals held that because the judgment has been satisfied, defendants waived their right to appeal the judgment for error. In *Joechim III*, the trial court awarded plaintiffs $15,082.62 in damages plus taxable costs and interest, and dismissed defendants' counterclaims. The defendants paid the damages in full prior to the entry of the judgment, and in exchange, plaintiffs transferred a warranty deed to the defendants. This transaction was acknowledged in the executed judgment.

Case evaluation sanctions were ordered after the judgment was entered; defendants also paid this amount in full. Subsequent to paying the judgment and case evaluation sanctions in full, defendants filed an appeal alleging error with regard to the judgment. The Court of Appeals stated:

> "The general rule states that a satisfaction of judgment is the end of proceedings and bars any further effort to alter or amend the final judgment." *Becker v. Halliday, 218 Mich.App 576, 578; 554 NW2d 67 (1996).* As noted in *Becker* ... "a party who accepts satisfaction in whole or in part waives the right to maintain an appeal or seek review of the judgment for error, as long as the appeal or review might result in putting at issue the right to the relief already received." **This reasoning applies with equal force to defendants satisfying a judgment as it does to plaintiffs accepting the satisfaction of a judgment.** See *Horowitz v. Rott,* 235 Mich. 369, 372; 209 NW 131 (1926) (satisfaction of a judgment bars appeal). [*Grand Valley Health Center v. Amerisure* ___ Mich.App ___; ___ NW2d ___ (Docket No. 244777, issued March 4, 2004) slip op, p 26.]

> Here, defendants completely satisfied the judgment entered in plaintiffs' favor. When the judgment was entered, **"two courses were open to defendant. He could satisfy the judgment or review it in this court. He could not do both.** He chose by his voluntary act to satisfy it. When the judgment was satisfied the case was at an end." *Horowitz,* supra at 372. Accordingly, defendants have waived their right to appeal the judgment for error.

Id.

See also Amerisure Ins. Co. v Auto-Owners Ins. Co., 262 Mich App 10, 684 NW2d 391 (2004), where Amerisure sought permission of the trial court to place the amount of the **judgment into an interest bearing account** pending the appeal to avoid the necessity of paying statutory interest on the judgment. *Id.* at 27. **The trial court held that Amerisure had two options: (1) either satisfy the judgment, or (2) post a bond on appeal. *Id.***

On review, the Court of Appeals held

> The trial court's analysis was correct. As noted in *Becker v. Halliday,* 218 Mich.App. 576, 578, 554 N.W.2d 67 (1996), "a party who accepts satisfaction in whole or in part waives the right to maintain an appeal or seek review of the judgment for error, as long as the appeal or review might result in putting at issue the right to the relief already received." This reasoning applies with equal force to defendants satisfying a judgment as it does to plaintiffs accepting the satisfaction of a judgment. See *Horowitz v. Rott,* 235 Mich. 369, 372, 209 N.W. 131 (1926) (satisfaction of a judgment bars appeal).

See also Becker v Halliday, 218 Mich App 576, 554 NW2d 67 (1996), where plaintiff appealed the trial court's denial of case evaluation sanctions for the reason that plaintiff signed a satisfaction of judgment prior to receiving sanctions that expressly provided that all "interest, costs, and attorney fees" were included. The Court of Appeals held that a satisfaction of judgment extinguishes the claim, and, as discussed previously, may be reviewed only on a very limited basis; therefore, when parties enter into a satisfaction of judgment that expressly provides that it includes costs and attorney fees, there is a waiver of any additional costs or attorney fees to which a party may be entitled under the court rules. *Id.* at 579.

In the case at bar, Defendants Joyce Schmitt and Diane Rankin's claim of appeal seeks review of the case evaluation sanctions order entered August 31, 2004 and amended case evaluations order entered September 8, 2004. Payment was made on September 7, 2004 pursuant to the initial case evaluation order entered on August 31, 2004, the satisfaction of judgment was signed by plaintiffs on September 13, 2004, and the claim of appeal was later filed on September 20, 2004.

As a result of payment in full by the Defendants, there is no case and controversy to review. The fact that payment was made as a result of executed garnishments is no consequence. *See Horowitz*, 235 Mich 371.

The Court of Appeals has held that because garnishments were involved, payment was involuntary and there was no waiver. However, Defendant Rankin cooperated with Plaintiff obtaining the funds, stated in a letter to Primerica that she was not going to file an appeal, and proceeded to request a satisfaction of judgment. Her remedy was a motion to stay or the filing of an appeal bond – neither was done.

Her decision not to file a motion for stay or appeal bond was consistent with her waiver. The Defendants did not appeal the fact that the trial court held that the two Defendants would have to decide between each other whether contribution was required. The case evaluation sanctions were all paid in full by Defendant Rankin who waived her appeal.

Defendants Joyce Schmitt and Diane Rankin had two choices: (1) pay the judgment, or (2) post a bond on appeal. The Defendants did not file a motion to stay execution of the case evaluation sanctions nor did they post a bond on appeal, rather the judgment and order for case evaluation sanctions was paid and satisfied in full. To rule that Defendants could now appeal the relief already provided to Plaintiffs would negate the policy of finality and the constitutional requirement of case and controversy.

As long established precedent set by the *Horowitz* Court, *supra*, "the judgment in the circuit court having been satisfied, there is nothing before us to review; nothing upon which a writ of error can operate." *Horowitz,* 235 Mich. at 370.

Conclusion

First and foremost, the new formula implemented by the Court of Appeals must be reviewed. It affects the case evaluation rules for all future litigants. This rule was implemented without briefing of the parties, without the authority of the court rules, and essentially set aside stipulations of the parties without request.

Furthermore, the law is clear. A trial court can order case evaluation sanctions after taking into consideration injunctive relief regardless of whether equitable

remedies were reviewed by the evaluators. The evaluators have no authority to award equitable relief. Further, the trial court had the authority to award case evaluation sanctions after the jury awarded some attorney fees pursuant to MCLA 600.2911(7). More than one court rule awarding attorney fees can apply as long as the aggregate award does not exceed 100% of the total attorney fees incurred. To hold otherwise would invalidate several other awards permitting attorney fees.

Furthermore, the trial court acted within the discretion pursuant to MCR 2.405(O)(5) and awarded case evaluation sanctions.

Finally, Diane Rankin has never requested case evaluation sanctions and is now being awarded fees on appeal despite briefing or request from other party. Issues waived are not properly before the appellate court.

A satisfaction of judgment waives the right to maintain an appeal or seek review of the judgment or order for relief for error as long as the appeal might result in putting at issue the right to relief already received.

Plaintiffs respectfully request that the opinion of the Court of Appeals is reversed and set aside, and the trial court opinion is reinstated.

Relief Request

Plaintiffs request that the order of the trial court is affirmed, or in the alternative, that all objections to the case evaluation order were waived after the order was satisfied.

Respectfully submitted,

Dated: December 21, 2005

SKINNER PROFESSIONAL LAW CORPORATION

David R. Skinner (P20551)
Attorney for Plaintiffs

SKINNER PROFESSIONAL LAW CORPORATION

Staci M. Richards (P64566)
Attorney for Plaintiffs